

In The Circuit Court of Russell County, Alabama
State of Alabama

	§	
ROY D. HEATH,	§	
Petitioner,	§	
	§	
US	§	CASE NO. CC-01-30.62
	§	
STATE OF ALABAMA	§	<u>36.62</u>
Respondents.	§	

Motion To Alter, Amend, Or Vacate
A Judgment, Pursuant To ALABAMA RULES
OF CRIMINAL PROCEDURE RULE 24.4

NOW Comes the Petitioner, ROY D. HEATH, who in
 THE ABOVE Reference Cause, and for good cause
 presents as follows:

"Jurisdiction Of The Court, Facts, Grounds
 For Relief, Arguments, Relief Sought,
 Affidavit In Support Of Relief as a matter
of Law Documents In Support Pursuant To 32.3"

Jurisdiction Of The Court

THIS Court has Jurisdiction pursuant To EDGAR V.
 STATE, 646 So. 2d 683 (Ala. 1994), THE ABOVE Motion

Tolls THE TIME FOR Appeal T. of Ruling is Reversed upon THE Above foregoing, Rule 24, U.R. Court.

Where as here at Criminal Defendant's Motion For a New Trial is deemed denied under THE provisions of 'Rule 24.4 U.R. Court', without a Affirmative Statement by THE Trial Judge giving THE Ruling a Presumption of Correctness and THE Defendant suspects His New Trial Motion by Evidence THAT was not presented at Trial, THE Denial by 'Operation of Law' should be Reversed and THE Case Remanded for THE Trial Court To Conduct a Hearing on his Motion for New Trial and THEN enter an Order either granting or denying THE motion."

"FACTS"

On About April 9th, 2001, THE Petitioner entered a Plea of Guilty in Court, as charged in THE Indictment with THE State of Alaska, Russell Court, sentencing date set for 5/31/2001, THE Agreement made, Reached Between THE Petitioner and THE STATE To W.T.:

"IF THE Defendant files any Post Conviction Petition (including but not limited To a Rule 32 Petition, a Motion For New Trial, a Motion To Set Aside THIS Plea Agreement or an Appeal) THE STATE shall Void THIS Agreement and return THE Original Charges in THIS matter To THE Trial Docket." SEE EXHIBIT I. Support, pursuant To Rule 32.3. Border of Post Exh. I - H, attached herewith.

On 5/31/2001 at sentencing, Petitioner attests
9.25.9m (2)

MR. Butler: I believe Mr. Hunt wants to say something to the Court.

THE DEFENDANT: Sir, I was going to ask you, could you give me a little more time before you put me in jail because my mom, she's hurt real bad, and I ain't been able to tell her I'm going to jail. They've got her in CCU in Birmingham, and I can't tell her that I'm going away for a while. She won't be able to see me because she can't get around. After she gets out, if she gets out, and I need a little more time with her.

THE COURT: Well, I'm going to decline to continue this any further. Is there anything else you want to say?

THE DEFENDANT: Decline, what do you mean?

MR. Butler: Is there anything else you want to say?

THE DEFENDANT: Yes, sir, I need to stay out and see my mom so I can tell her.

THE COURT: Well, people stay out of jail don't need to be selling drugs.

THE DEFENDANT: Yes, sir.

THE COURT: That was the problem and that's what you should have thought of before you were out selling drugs.

THE DEFENDANT: Yes, sir, but I need to -- (stay out) I need a little more time so I can be with her. They've got her on life support.

THE COURT: What about no did you not understand?

THE DEFENDANT: I understand, sir. I don't wish to withdraw my plea in order to stay out, but if that will help me stay out, I got to do that, too. I don't want to,

but -- (I want to withdraw my guilty plea) AT THIS TIME THE COURT TOLD ME IF I WISH TO WITHDRAW MY GUILTY PLEA, SEND THEM SOMETHING IN WRITING, SEE EXHIBIT-B, IN SUPPORT, PURSUANT TO RULE 32.3 BORDER OF PLEA WHICH ENTITLES PETITIONER TO RELIEF AS A MATTER OF LAW, ATTACHED HERETO.

(A) THE PLEA AGREEMENT DATED 4/9/2001 IS AN OFFICIAL CONTRACT, A PROMISE, A WRITTEN AGREEMENT FROM THE STATE OF ALABAMA, RUSSELL COUNTY.

(B) SEE EXHIBIT-B, IN SUPPORT OF RELIEF SOUGHT, WITHOUT IN SUPPORT ATTACHED HERETO.

"Ground For Relief"

THE STATE BREACHES THE PETITIONER'S PLEA AGREEMENT DATED 4/9/2001, WHEN THE COURT DID NOT ALLOW PETITIONER TO WITHDRAW HIS GUILTY PLEA AND RETURN THE ORIGINAL CHARGES TO THE TRIAL DOCKET.

"BECAUSE THE AGREEMENT REACHES BETWEEN THE PETITIONER AND THE STATE, STATES:

"IF THE DEFENDANT FILES ANY POST CONVICTION PETITION (INCLUDING BUT NOT LIMITED TO A RULE 32 PETITION, A MOTION FOR NEW TRIAL, A MOTION TO SET ASIDE HIS PLEA AGREEMENT OR AN APPEAL) THE STATE MUST VOID THIS AGREEMENT AND RETURN THE ORIGINAL CHARGES TO THE TRIAL DOCKET, SEE EXHIBIT-B, IN SUPPORT OF RELIEF SOUGHT ATTACHED HERETO, DATED 4/9/2001."

"ARGUMENT In Support"

Peltone, Not Heath, respectfully argues that where the Trial Court accepted the defendant's guilty plea, its required by *Boykin v. Alabama*, 395 U.S. 233, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) and Rule 14.4, assures that the constitutional safeguards of a complete trial.

Further argument is needed, where the Trial Court did not carry out a plea agreement reached between the prosecutor and the defense counsel: To wit,

"RC-22, Plea Agreement, (Page RC-24) 'Hearst' states: If the defendant files any post conviction petition (including but not limited to a Rule 32 petition, a motion for new trial, a motion to set aside this plea agreement or a appeal) the State may void this agreement and return the original charges in this matter to the Trial Court."

Peltone argues that the defendant must be allowed an opportunity to withdraw his guilty plea. "The Court held in *Chaf v. State*, 562 So.2d 1307 (Ala. 1990) Chaf's argument on appeal is that the Court erred to reversal in denying her motion to withdraw her guilty plea after it declines to follow the plea agreement. In *Ex parte YARBOR*, 437 So.2d 1330 (Ala. 1983) this Court held that once the State enters into a plea agreement with a defendant, the State cannot renege the agreement with impunity and that the defendant has the right to have

THE Agreement Submitted To THE Court if he so requests THE Trial Court is not bound To accept THE Agreement, but when THE Trial Judge decides not To carry out an agreement Reached between THE Prosecution and THE Defense Counsel, THE Accused "must" be afforded THE Opportunity To withdraw his or her guilty Plea on motion promptly made, Ex Parte Otinger, 493 So 2d 1362, 1364, (Ala 1986) THE State does not quarrel with these established principles of law

Peterson further needs To argue "Clark V. State, 655 So 2d 80 (Ala Crim App 1995) which held: "It is well settled That when THE Trial Judge decides not To carry out an agreement Reached between THE Prosecution and THE Defense Counsel, THE Accused "must" be afforded THE Opportunity To withdraw his or her guilty Plea on motion promptly made, Ex Parte Clay, 562 So 2d 1307, 1309 (Ala 1990) (quoting Ex Parte Otinger, 493, So. 2d 1362, 1364 (Ala 1986) Because THE Trial Court did not carry out THE Plea agreement in this Case, Clark must be allowed To withdraw his guilty Plea

SEE Affidavit In Support with Documental Evidence Pursuant To Rule 32.3, "Burden of Proof" Exhibit - A, and B, which entitles Peterson To relief as a matter of law, Therefore THIS Court should Pursuant To Rule 24.4, H.R. Crim P., Affee, Amend, or Vacate its CRSE Issued June 12, 2003 in its entirety.

EXhibit 14

ISSUE NO^o II

Peterson States Facts, Grounds, Movement In Support.

Disputed evidence, which entitles H to relief
as a matter of law.

"FACTS"

On about April 31st, 2001, The Petitioner
was sentenced to (30) Thirty Years In Case No.
CC-CI-030 (This 30 years shall consist of 20 years
for a violation of § 13A-12-211, and additional
5 years mandated by § 13A-12-250, for sales
of a controlled substance at or near a school
campus and an additional 5 years mandated
by § 13A-12-270, for a sale of a controlled
substance at or near a public housing project.
In Case No. CC-CI-036, Petitioner was sentenced
to (30) Thirty Years. This (30) Thirty Years shall
consist of 20 years for a violation of § 13A-12-211,
the additional 5 years mandated by § 13A-12-250,
for a sale of a controlled substance at or
near a school campus and additional 5 years
mandated by § 13A-12-270 for sale of a controlled
substance at or near a public housing project, This
Case No. CC-CI-036 To Run Concurrently with THE
sentences imposed in Case No. CC-CI-030, See
Petitioner's Affidavit In Support Pursuant
To Rule 32.3. Order of Proof which entitles him
to relief as a matter of law, (Exhibit B, pages
26, 27, 28, That will support the relief sought.

"Ground For Relief"

THE STATE WAS WITHOUT THE SECTION TO RUN
"Enhancements, § 130-12-250 AND 130-12-250
CONCURRENTLY WITH THE BASE SENTENCE"

"Arguments"

Peltone argues "Legislative Intent," sections
130-12-250 AND 130-12-270, clearly apply ONLY TO
SENTENCING. THE LEGISLATURE OF ALABAMA WANTED TO LESSEN
THE RISK THAT DRUGS WOULD BE READILY AVAILABLE TO
SCHOOL CHILDREN. IT IS SURELY ENTIRELY TO BELIEVE THAT
QUAL BY INCREASING PENALTIES FOR THOSE WHO SELL DRUGS
IN SCHOOLS. AS THESE STATUTES CONCERN ONLY SENTENCING
CONSIDERATIONS, THEY WERE PROBABLY INTENDED BY THE FINAL
COURT, *Ward v. State*, 649 So.2d 1324 (Ala. Crim. App. 1994).

THE LEGISLATIVE INTENT IS THAT THESE FIVE-YEAR PENALTIES
SHALL NOT RUN CONCURRENTLY WITH EACH OTHER OR WITH ANY
OTHER SENTENCE IMPOSED. THE ENHANCEMENT TERM PROVIDED
MUST BE "ADDED TO" ANY OTHER PENALTY IMPOSED BY THE
COURT. *Fletcher v. State*, 675 So.2d 55 (Ala. Crim. App. 1995)
(AFFIRMED 675 So.2d 428 (Ala. 1996)).

THE THREE-YEAR DRUG PROTECTIVE ZONE PROVIDED BY
THIS SECTION IS ENTIRELY INHARMONIOUS TO THE LEGISLATURE'S PURPOSE
IN ENACTING THE STATUTE. THIS IS FURTHER REINFORCED BY THE
COURT'S DECISION IN *Elston v. State*, 687 So.2d 1239 (Ala. Crim. App. 1996).

Appellant who Permitted To Two Counts of unlawful distribution of 11 controlled substance, in violation of § 134-12-211 did not comply with the statutory requirements where the Trial Courts Order, in respect results in the enhancements, one count being served concurrently with the enhancements in the other County although it was permissible for the Court to Order that the base sentences of three years be served concurrently, the enhancements were to be served consecutively with every other results involved. *MARRIENS V. STATE*, 773 So.2d 1053 (Ala. Crim. App. 2000).

ISSUE NO. III

Pettine States Facts, Grounds In Support, Documental Evidence, which entitles him to relief as a matter of Law, attached Exhibit I, Support, Reason To Rule 323(b) of Rule

FACTS

Pettine has To The Circuit Court Clerk, To inform of his appeal after several attempts To contact his attorney of same, The Clerk of The Court sent notice of appeal To The Alabama Court of Appeals, The Alabama Court sent the Order issued July 12, 2001, notifying The Petitioner, Attorney, John B. Hall, "Stating You are hereby

noted that the above references apparent is deficient in that the Docketing Statement Form filed 26. 12. 15 The Records Transcript of the Court Form filed 10. 11. 15 has not been filed (see 3(e) and 11(c)(2) of The Maryland Rules of Appellate Procedure) and since the fact to comply with the time prescribed by the Appellate Court, the Court takes issue to Attorney Butler, of first notice before dismissal. He allowed Paltrow appeal to not be perfected, the time requested by the Court of Appeal would have shown the issues. The Circuit Court is taking issue and Paltrow agrees with the Trial Court, although John Butler should have raised these issues on direct appeal, and I agree the Trial Court recognized this as well.

Ground For Relief

Attorney John Butler deserves ineffective assistance of counsel for failure to perfect appeal.

Relief Sought

Paltrow alleges the Court held in Jones v. Cowley, 28 7. 3d 1067, (Md. Ct. 1994) (holding if counsel failure to perfect Paltrow's appeal in State Court constituted violation of right to effective counsel on appeal cause was remedied. Standard is satisfied as constitutionally ineffective.

Counsel, Counsel's Cause and Prejudice is Presumed when Counsel fails To Protect Appellant, U.S.C.A. Const Amend 6

Patterson argues That Counsel whether retained or appointed has A Duty To Protect Patterson's right To appeal, and Counsel cannot discharge this duty by allowing Patterson ample Time to exercise without Taking Proper Action, once Patterson has indicated desire to appeal, Counsel's failure To protect appeal when he has not been relieved of his duties through successful withdrawal constitutes violation of Patterson's right to effective assistance of Counsel on appeal, U.S.C.A. Const Amend 6. See Attached Affidavit In Support Pursuant To Rule 32.3(b) of the Rules of Court

ISSUE NO^o III

Patterson States Facts, Grounds, Argument In Support, Document 1 Evidence, and other matters that he Relies on as a matter of Law.

Facts

The Honorable Charles E. Floyd, III was appointed To represent the Patterson on his appeal, The Attorney Charles E. Floyd III who after being appointed, "NOT Reviewing The file, Records, That was before him, He files it without going To the Court of Appeals, Turning it blind eye To the facts before the state."

indicates that the T. 1 Attorney was ineffective for not complying with the Order Issues by the Court of Appeals on July 12th, 2001 and July 27th, 2001, but attorney still being allowed to be dismissed. See attached Affidavit In Support Request To Rule 32.3 Subpoena of Ref.

"Grand Jury Refusal"

Peltone's Counsel was Ineffective for failure to file Ineffective Assistance of Counsel on the T. 1 Attorney when aware is plain from that Court of Appeals indicating that Counsel to send 2 files that goes into review of appeal.

"Argument In Support"

Peltone argues that letter U.S. 11th, 905 F.2d 885 (5th Cir. 1990) holding an attorney is constitutionally entitled to effective assistance of Counsel on direct appeal 113 Ct. Right, L. 113 v. Lacey, 969 U.S. 387, 105 S.Ct. 830 83 L. Ed. 2d 821 (1985). Letter contends that he was least effectively denied assistance of Counsel on appeal because his attorney files a brief which did not assert any arguable legal error therefore Petitioner should be reversed. The Supreme Court clarified the two types of claims involving the denial of effective assistance of appellate counsel in *Pence v. Ohio*, 88 U.S. 75, 109 S.Ct. 3, 6, 354-5, 102 L. Ed. 2d 30 (1998).

First, if there was no actual or constructive denial of counsel or waiver, the prejudice is presumed. Second, if the claim is that counsel's performance was actually effective, the petitioner must show prejudice.

The District Court considered this to be a case of the second type, to be assessed under Strickland's prejudice standard. This was error.

Re see sentences *Michigan v. Calitimer*, 338 U.S. 738, 87 S.Ct. 1396, 12 L.Ed.2d 93 (1962) where the Court recognized that in some circumstances counsel could withdraw without doing any representation, and some statements were observed. All the counsel to a technically did not withdraw, he may as well have. He presented no claim of error to the Michigan Court. *Michigan v. Calitimer* holds that a trial court could be found to be in error if "conscientious examination of the case" [quoting] at 744 [87 S.Ct. at 1400] ... If he is so in then of the case that the case is not in error. Counsel must request leave to withdraw. The request must, however, be accepted as to it must refer to anything. The record that might reasonably suggest the error. *Ibid.*

Re see, 109 S.Ct. 330. Here counsel withdrew. Though the case was to show, as he asserted regarding the record, but he did not follow the Michigan procedure, and he then asked to withdraw and filed a brief that pointed to nothing, arguing all something, in error.

Relief Sought

Based on the Petitioner's arguments, Pursuant to the Missouri Rules of Criminal Procedure and Rule 29 U.S.C. This Court should Reconsider its Order Issued June 12th, 2003. Petitioner requests This Honorable Court Pursuant to Rule 329(d) make Specific findings of fact to each issue presented by Petitioner. This Court should therefore Affirm, Vacate, or Vacate its Judgment, Remand This Case back before the Trial Court, Set This Case down for an evidentiary Hearing, Send a Transmittal Order returning Petitioner to the Circuit Court of Russell County.

Respectfully Submitted
Roy David Keith

"Certificate of Service"

I Herby Certify That I have served upon the Circuit Court Clerk of Russell County the Above foregoing and all Court upon the Court of Criminal Appeals all the foregoing mailing Address by Priority Mail Service on the U.S. Mail Postmarked on This 11th Day of July, 2003

In The Circuit Court Of Russell County, Alabama
State Of Alabama

Roy Davis Heath,

Plaintiff,

vs

State Of Alabama

Defendants

CASE NO. CC-01-30,36,62

Affidavit In Support Of Relief As A
Writer Of Law Pursuant To Rule 32.3

I, Roy Davis Heath, hereby state and affirm as follows:

That I am the Plaintiff in the above "Reference Case" and over the age of 21-years old and have personal knowledge of the facts that were followed and know that they are in direct violation of The Code of Alabama, 1975.

I do swear under penalty of Perjury that every thing contained in the above foregoing is true and correct to the best of my knowledge and Exhibit A herein now attached to support Plaintiff's claim for relief as it applies to and pursuant to Rule 32.3(b)(1) of Prob.

Exhibit-H, pages 22, 23, 24, That Petitioner submits will show that the Petitioner entered a Plea of Guilt in Court 1, its charges in the Indictment with the State of Minnesota, Russell County. The Agreement made reaches between the Petitioner and the State to wit:

"If the Defendant files and best answer Petitioner (including but not limited to at Rule 32 Petitioner motion for new trial, or motion to set aside this plea agreement or its effect) the State shall void this Agreement and is return the original charges in this matter to the Trial Doctor.

Exhibit-B, pages 24, 25, That Petitioner submits in support of Relief sought will show that the Petitioner made several attempts to withdraw his guilty Plea before sentencing was imposed by the State of Minnesota, Russell County to wit:

"Page 24, 1-25 and Page 25, 1-15 That will support the Relief sought as a matter of law.

Exhibit-C, pages 28, 29, That Petitioner submits in support of Relief sought will show before this Court with the time prescribed by law to withdraw his Plea of Guilt was timely presented to the Hon. Court of Russell County before the Honorable Judge SEE Exhibit-C, page 28, line 23 thru 25 and page 29, 1-6. That will support the Relief sought as a matter of law.

Exhibit-D, pages 26, 27, 28, That Petitioner submits in support of the relief he seek is a matter of Law pursuant to Rule 323 order of proof will show the Court that the enhancements (aggravated) is the base sentence see Exhibit-D, pages 26, 1-9, and 23-25, page 27, 1-10, page 28, 1-2, 3 That will support Petitioner relief is a matter of Law.

Exhibit-1, will show That Petitioner's attorney was ineffective for failure to object Petitioner's appeal after he was aware Petitioner wished to appeal this case.

(A) Exhibit-1, will show Petitioner's attorney was notified by the Court of Appeals in written form stating:

"You are hereby notified that the above-referenced appeal is deficient in that the Docketing Statement, from NAC 20, and the Petitioner's Cause of Error - (criminal, from NAC 11, have not been filed (see Rule 3(e) and 10(c)(2) of the Arizona Rule of Appellate Procedure). See Exhibit 1.

Exhibit-2, That Petitioner submits will show after Petitioner's attorney failed to comply with the (Deficiency noted) a final notice before dismissal was sent to the Hon. John M. O'Hara, Petitioner's attorney, and through no fault of Petitioner his appeal was not perfected. Exhibit-2 will show Petitioner is ineffective for not objecting Petitioner's appeal.

Exhibit 3, Tilt Petitioner submits will show
 The Court of Appeal Entender Petitioner on
 January 2, 2002 that he had been appointed
 as appeal attorney, and that attorney who was
 appointed requested an extension of time to
 prepare it to be in Petitioner's behalf.

Exhibit 4, Tilt Petitioner will show appeal attorney
 was ineffective for failure to review the records
 on file, and the ineffective on Petitioner that
 attorney for failure to protect his appeal case.
 He was out here not once but the first of appeal
 appeal but twice and he refused to file an appeal
 in Petitioner's behalf.

Exhibit 7 will show appeal attorney
 file is no merit suit, stating he is left with
 no option but to file an appeal suit, that
 he have found no errors on file records.

For the above reasons, Due to
 support request to Rule 32.3 Board of Post
 This Court should allow, that is, or vacate its
 Judgment on its entirety, set this case down for
 the Court to hear, sent to the Court Clerk
 His Honor Petitioner back to Court in this matter
 Request to Rule 24.4 and Rule 32.9(d) as Petitioner
 is entitled to relief as a matter of law.

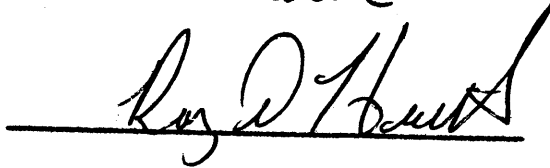
SWORN AND SUBSCRIBED before me
on This 9 DAY of July 2003.



NOTARY Public

11-5-06

MY Commission Expires



CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT THE ABOVE
FOREGOING HAVE BEEN SERVED UPON THE FOLLOWING
BY PLACING SAME IN THE UNITED STATE MAIL
DONE THIS THE _____ DAY OF _____ 2003, Properly
Address as follows:

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
300 DEXTER AVENUE
P.O. BOX 301555
MONTGOMERY, ALABAMA

36130-1555

IN THE Circuit Court of Russell County, Missouri
STATE OF MISSOURI

vs
 Rex David Heath,
 Plaintiff,
 vs
 vs
 vs
 STATE OF Missouri,
 Respondents.

CASE NO. 11-01-036036

Notice of Appeal

The Petitioner in the above titled matter hereby gives notice of appeal to the Circuit Court for the Court of Criminal Appeals from the decision rendered in this matter, 6/12/2003, wherein the Trial Judge denied Petitioner's Rule 32-Petition and for the following reasons: The Petitioner now brings to this his appeal in the Circuit Court of Russell County, Missouri. He has probable cause to believe that by this his appeal was along with the Post-Trial motion pursuant to Rule 29, M.R.C., will be the best thing to do (see annex), Dated This 11th day of July, 2003.

also
 Exhibit (14)
 1 of 20

EXHIBIT (13) 2 of 2 Rex D. Heath